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IN THE

Supreme Court of the United States

OCTOBER TERM 1962

No. 756

ORION T. WHITING, JR., and LUCRETIA KILLINGS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In seriatim petitioner replies to respondent's argument, thusly:

1. SUPPORTING AFFIDAVIT RE: APPLICATION FOR SEARCH WARRANT.

Respondent states "Information that petitioners were engaged in gambling was corroborated by the officers' personal observations of the activities of petitioners, which were consistent with their operation of a gambling enterprise. See Jones v United States, 362, U.S. 247, 267-272.

Concern with—engagement in—operation of a gambling enterprise, *alone*, sans acceptance of wagers violates no federal statute petitioners were charged with having violated.

In United States v Calamaro, 354 US 351, 77 S Ct. 1138, 1 L ed 2d 1394, 1397, this Court said, re liability under the statutes here in question:

> "* * * the government has to argue that the wager is received a second time when the writer hands the yellow slip to the pick-up man. But we think this ignores the very real difference between a wager and a record of a wagering transaction. It is the banking record and not the wager which the pick-up man receives from the writer and transmits to the bank. The pick-up man no more receives wagers than a messenger, who carries records of customers transactions from a branch bank to a central office, receives deposits." 236 F2d at 184, 185.

The record in this cause shows:

1. Persons delivered bags to petitioners—contents unknown.

2. Whatever the contents they had been received at a time and place prior to delivery to petitioners.

3. Assuming arguendo they contained wagers—those had been received by others.

Delivery of the bags did not constitute acceptance of a wager.

Petitioners picked up and transmitted to a counting house the records of wages made—the statutes in question did not apply to them under the rationale of the Calamaro case, supra.

There was no evidence remotely tending to show that at the place where petitioners took the bags any other person ever appeared to make a wager or collect a wager.

There was no scintilla of evidence that wagers were paid off at that place.

Every piece and parcel of evidence established that at that place the auditing or book-keeping was conducted—

nothing more. Ergo, observations establishing that petitioners received something from persons suspected of having received wagers at a time and place prior to and other than the place of observation, can at most constitute evidence of pick-up activities; wherefore petitioners are not subject to the penalties of the statutes in question.

Jones v United States, 362 U.S. 257, 267-272 avails respondent not at all.

There the seizure was of narcotics—contraband under all circumstances.

> There (p. 271) * * * we may assume that Didone (affiant officer) had the day before been told, by one who claimed to have bought narcotics there, that petitioner was selling narcotics in the apartment. Had that been all, it might not have been enough; but Didone swore to a basis for accepting the informant's story. The informant had previously given accurate information.

In the present cause the informants spoke of matters many years past. They did not claim to have been privy with petitioners in any violation of law—at any time—or at any place.

They did not speak of *knowledge of anything* desired to be reached by warrant that established violation of the statutes in question. As per the respondent's brief the matter sought had to do with indicia of violations of local gambling statutes and nothing more.

2. AS TO EXECUTION OF WARRANT.

The officer who broke into the establishment stated he waited between 50 and 60 seconds—this is not denied.

The officer who came to the door where persons were seated who were willing and eager to open a door stated he warned them not to move under penalty of bodily harm—after demand for entry had been made—empha-

sizing the compelling quality of his order with show of a dangerous and loaded weapon. This is not denied.

What is contended is that failure to admit—forthwith—notwithstanding the threat of being shot if any move to admit was made—constitutes refusal after the law enforcement agent demands admittance and that therefore 18 USC 3109 sanctions forcible entry.

Neither this Court, any Circuit Court of Appeals, any District Court, or any State Court has ever thus interpreted the right of forcible entry.

3. HEARING ON THE MOTION TO SUPPRESS.

The government, seizes upon the alleged proposition petitioners stated their desire to know of the identities of informers, upon pre-trial motion to suppress, were not identified with any trial defense.

Such knowledge is vital at pre-trial, not less than defense, and this Court in Greene v McElroy, 360 US 474, 3 L ed 1377, 1390, 1391, 79 S Ct 1400, said:

> * * * where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, (as, for instance, affidavits supporting application for search warrant) it is even more important where the evidence consists of the testimony of individuals whose memories might be faulty or who, in fact, might be purjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. * * * They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him."

Prior to interposing any affirmative defense the right to destroy the government's alleged case, through cross examination of hostile witnesses—actually confronted in

a judicial forum—supports the constitutional right guaranteed by the Sixth Amendment.

And the more so when the principal witness wears the credentials of credibility of the government witness Bedingfield.

3b. PLEA IN BAR.

In 1951 petitioner Whiting applied for stamp as required by the statute in question.

Issuance was denied.

Tax was imposed by the collector there upon monies petitioner said he had earned in gambling activities—withal not accepting wagers.

Tax was collected, not under the statutes involved in this prosecution by the government but under another statute.

Subsequent activities of the same nature were deemed proof beyond a reasonable doubt of "willful" violation of the statutes here in question.

Where in judicial literature can be found a definition of "willful" stating that failure to obey a statute the sovereign says does not apply to an individual is a crime?

3c. DENIAL OF RIGHT TO CROSS-EXAMINE GOVERNMENT WITNESS.

This contention, it will be observed, introduces a new element into the right of cross-examination.

The Revenue Agent witness testified as an expert that in his opinion a gambling enterprise was conducted at the premises searched.

He had expressed an opinion that the petitioner Whiting was a banker; he was then asked his opinion as to the co-petitioner Killings.

At a prior judicial hearing of the case against her this witness had testified that in his opinion she was helping Whiting out as an employee.

In Grunewald v United States, 351 US 391, 77 S. Ct. 963, 1 L. ed 2nd 931, 951, this Court said:

> It is, of course, an elementary rule of evidence that prior statements may be used to impeach the credibility of a criminal defendant or an ordinary witness.

It is elementary that the expert witness may be interrogated as to his opinion on all phases of his testimony in chief.

4. INSUFFICIENCY OF EVIDENCE

The evidence established at best participation in a gaming enterprise.

The claim here made by the respondent is in direct conflict with United States v Calamaro, 354 US 357, 77 S. Ct. 1138, L. ed 2nd 1394, 1397.

Here the Court said among other things:

> "Thus, the government has to argue that the wager is received a second time when the writer hand the yellow slip to the pick-up man. But we think this ignores the very real difference between a wager and a record of a wagering transaction. It is the banking record and not the wager which the pick-up man receives from the writer and transmits to the bank. The pick-up man no more receives wagers than a messenger, who carries records of customer transactions from a branch bank to a central office, receives deposits."

Animadverting to the refusal to grant a motion for judgment of acquittal this ruling is in conflict with rulings in other Circuits and with rulings on the same question in its own Circuit, as follows:

White v United States, 279 F 2d 740, 748, CCA 4—1960

> (6-7) * * * Upon consideration of the motion for judgment of acquittal, * * * the question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt. Bell v United States, 4 Cir. 1950, 185 F 2d 302. (And cases cited).

United States v Consolidated Laundries Corp., 301 F 2d 563, 574 CCA 2—1961:

> (20) * * * defendants contend that the trial court erred in refusing to apply the reasonable doubt test in ruling upon their motion for acquittal at the close of the government's case. Judge Palmieri held that the applicable standard is whether he *could*, not whether he *would* find the accused guilty on the government's evidence. * * * We agree with it.

Riggs v United States, 280 F 2d 949, 953, —— CCA 5—1960

> (1-3) * * * on motion for judgment of acquittal * * * the Court's function, so it has been said, is to find whether or not, taking the view most favorable to the Government, there is substantial evidence to support a verdict of guilty (citing Glasser v United States, 1942, 315 US 60, 80, 62 S Ct. 457, 86 L ed. 680 * * *, means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (Citing—Consolidated Edison Co., of New York v National Labor Relations Board, 1938, 305 US 197, 229, 59 S Ct. 206, 217, 83 L ed. 126). The "conclusion" of a jury returning a verdict of guilty is that of guilt beyond a reasonable doubt.

And see Curley v United States 1947, 81 US App. D.C. 389, 160 F 2d 229.

It will be noted that the cases cited establish in those circuits that the Court must find where he denies such a motion that there is substantial relevant evidence which

would justify the conclusion of a jury of guilt beyond a reasonable doubt.

How can it be successfully asserted here that the Judge so found? His own statement was that he had found no evidence of definitive value; that as to the petitioner Killings he had no idea of what her activities had been and that as to petitioner Whiting he guessed that this petitioner had been engaged in some aspect of a gambling operation. It is critical to note that he never said he had any idea there was substantial evidence which would justify a conclusion beyond a reasonable doubt that the petitioner had violated the statutes in question.

CONCLUSION

Such use of the taxing power as is here exhibeted subjects every citizen to a clear and present danger of being prosecuted criminally for possible violation of statutes of local nature, only. The taxing power has shown in the Calamaro and Ingram cases, supra, a disposition to abuse their legal authority; and protection of the entire public requires that such convictions receive the consideration of this Court.

Respectfully submitted,

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